

QUALIFIED AND CIVIC IMMUNITY IN SECTION 1983 ACTIONS: WHAT DO JUSTICE AND EFFICIENCY REQUIRE?

R. George Wright[†]

CONTENTS

INTRODUCTION.....	1
I. QUALIFIED IMMUNITY: SOME GENERAL TENSIONS.....	4
II. BURDENS OF PROOF AND APPEALABILITY: MODEST PRELIMINARY COMPLICATIONS	6
III. CONSTITUTIONAL BALANCING TESTS: HOW MUCH LAW CAN BE CLEARLY ESTABLISHED?	8
IV. LEVEL OF GENERALITY PROBLEMS: THE COMMON UNDERCUTTING OF RIGHTS ENFORCEABILITY AGAINST A BROADER BACKGROUND OF MANIPULABILITY	14
V. WHICH COURTS COUNT?: A FURTHER SOURCE OF ARBITRARINESS.....	18
VI. HOW QUICKLY MUST NEW LAW BE LEARNED?: PRACTICAL LIMITATIONS AS LIMITS ON THE ENFORCEABILITY OF BASIC FEDERAL RIGHTS.....	23
VII. GRANTS OF QUALIFIED IMMUNITY AS HINDERING THE DEVELOPMENT OF SUBSTANTIVE FEDERAL RIGHTS LAW	26
CONCLUSION: ABOLISHING QUALIFIED IMMUNITY AND PERSONAL LIABILITY IN FAVOR OF CONTROLLED VICARIOUS LIABILITY OF GOVERNMENTAL UNITS	29

INTRODUCTION

The boundaries between governmental power and personal right are always subject to contest and violation. Few institutions are as crucial in drawing these boundaries as § 1983 litigation¹ and related actions.² These

[†] Professor, Cumberland School of Law, Samford University. The author's thanks go to Tom Berg and Richard Delgado for their commentary.

1. Section 1983 refers to 42 U.S.C. § 1983 (1994), which provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the

causes of action are a significant element of the federal civil docket,³ and are of great constitutional significance.⁴ Given the sheer number and importance of these causes of action, one might well expect the law of § 1983 actions to by now display admirable rationality.⁵ As it turns out, however, any such expectation would be unmet.

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"

2. Much of the discussion below will be readily applicable to so-called *Bivens* actions against federal defendants. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Similar qualified immunity issues arise under § 1983 and under *Bivens*. See, e.g., *Johnson v. Fankell*, 520 U.S. 911, 918 (1997) ("We have recognized a qualified immunity defense for both federal officials sued under the implied cause of action asserted in *Bivens* . . . and state officials sued under 42 U.S.C. § 1983.") (applying a parallel qualified immunity test); *Waddell v. Forney*, 108 F.3d 889, 890 n.2 (8th Cir. 1997). A similar legal standard is applied as well in cases brought under 18 U.S.C. § 242, the criminal law counterpart of civil § 1983 actions. See, e.g., *United States v. Lanier*, 520 U.S. 259, 281 (1997); *Madiwale v. Savaiko*, 117 F.3d 1321, 1324 n.1 (11th Cir. 1997) ("[S]uits proceeding under both statutes make use of the exact same inquiry in order to determine whether, in the light of pre-existing law, the unlawfulness of an official's action is apparent").

3. It is difficult to pin down precise statistics regarding § 1983 actions filed or pending in federal and state courts. See THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION* 180-83 (4th ed. 1996). Some sense of magnitude is suggested by vaguely relevant statistics. For example, we are told that 37,723 statutory civil rights actions were filed or pending in the United States district courts in 1995. STATISTICAL ABSTRACT OF THE UNITED STATES 1996 215 (1996) (table no. 342). Another count refers to 42,007 civil rights actions filed in the district courts during 1996. JUDICIAL BUSINESS OF THE U.S. COURTS: 1996 REPORT OF THE DIRECTOR, 139 (1997) (table no. C-2A). In the federal appellate courts, a recent year saw 2,948 civil rights employment cases and 3,820 non-employment civil rights cases in which the United States was not a party. FEDERAL JUDICIAL CASELOAD STATISTICS: March 31, 1997 26 (1997) (table B-7). The United States was a defendant in 449 civil rights employment cases and 471 non-employment civil rights cases in the federal appellate courts in the same year. *Id.* at 25. These figures may, of course, employ inconsistent definitions of civil rights, and inevitably overstate and understate the numbers in different respects. Many civil rights actions involve no § 1983 or related claim, no allegation of action under color of law by any defendant, and no possible issue of qualified or civic immunity. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) *aff'd* 528 F.2d 1102 (8th Cir. 1976) (allegations of private employer racial discrimination under Title VII of the 1964 Civil Rights Act). On the other hand, § 1983 actions may be filed in the state as opposed to federal court system. See, e.g., *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

4. The quantitative significance of § 1983 and related actions has been regularly increasing. See, e.g., *supra* note 3. The qualitative constitutional importance of these causes of action is suggested at some length throughout.

5. Except where the context suggests otherwise, § 1983 actions will henceforth serve as shorthand for any sort of civil rights action potentially raising issues of qualified and civic immunity akin to those discussed below.

Section 1983 qualified and civic immunities in particular involve remarkable waste, inefficiency, pointless complexity, uncertainty, and unpredictability. They result in consistent patterns of injustice to litigating parties. Thus, crucial elements of § 1983 actions embody the vices of gross inefficiency and systematic injustice.

No doubt some instances of these vices are, from the standpoint of the judicial system itself, not vices at all. From that narrow, institutional standpoint, a set of "rules" that allows relatively liberal courts to reach correspondingly liberal results, and conservative courts to reach conservative results, may be quite stable. As we shall see, however, the "rules" of qualified and civic immunity disserve justice and the public interest more generally.

This article begins with a brief introduction of the idea of qualified immunity in § 1983 actions and of the purposes of that immunity.⁶ We then explore some illustrative complexities and uncertainties posed by qualified immunity. In particular, we will consider some questions of burden of proof,⁷ appealability,⁸ the role of balancing tests,⁹ the breadth or narrowness of the rules of substantive law deemed relevant to qualified immunity decisions,¹⁰ the breadth or narrowness of the range of jurisdictional sources of law deemed relevant to qualified immunity decisions,¹¹ the role of time lags and other issues involved in a potential defendant's learning of relevant rights,¹² the role of a defendant's understandable ignorance of the law as an excuse,¹³ and the common tendency for qualified immunity law to actually retard the progress and development of underlying substantive federal rights.¹⁴ From there, we shall conclude by placing the reform of qualified immunity law in the broader context of governmental liability.¹⁵

Ultimately, we shall argue, on grounds of efficiency and fairness, for abolishing qualified immunity for individual government actor defendants. At the same time, however, we shall argue for requiring all actions to be brought not against individual government employees, but against the em-

6. See discussion *infra* Part I.

7. See discussion *infra* Part II.

8. See discussion *infra* Part II.

9. See discussion *infra* Part V.

10. See discussion *infra* Part IV.

11. See discussion *infra* Part V.

12. See discussion *infra* Part VI.

13. See discussion *infra* Part VI.

14. See discussion *infra* Part VII.

15. See discussion *infra* Conclusion.

playing government itself, on the basis of vicarious liability for employee acts committed under color of state law.¹⁶

I. QUALIFIED IMMUNITY: SOME GENERAL TENSIONS

In general, qualified immunity shields individual governmental actors from personal liability in § 1983 damages actions if certain criteria are met. Such defendants will not be personally liable in damages if their conduct did not violate relevant federal constitutional or statutory rights of the plaintiff that were clearly established at the time of the defendant's act and of which a reasonable person or a reasonable official would have known.¹⁷ It is said that the inquiry is into the objective¹⁸ legal reasonableness¹⁹ of the defendant's action where that action is described with some degree of fact specificity.²⁰ Qualified immunity is said to protect mistaken but not plainly incompetent judgments or knowing violations of the law.²¹ Thus, a right may be clearly established and its violation may be apparent²² even in the absence of a precisely similar set of previously adjudicated case facts.²³

Several justifications have been offered for the availability of qualified immunity. The Supreme Court has declared that "[t]he central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'"²⁴ Qualified immunity thus recognizes a possible conflict between the public interest in active, vigorous law enforcement and a governmental actor's personal incentives. Even if promised indemnity, a governmental actor may err on the side of caution and sheer passivity in carrying out the law. Governmental actors could be deterred from proper law enforcement not only by fear of legal liability, but also by the

16. See discussion *infra* Conclusion.

17. See, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 304 (1996) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *Johnson v. Jones*, 515 U.S. 304, 311 (1995); *Siebert v. Gilley*, 500 U.S. 226, 236, 243 n.5 (Marshall, J., dissenting) (referring to "a reasonable official"); *Anderson v. Creighton*, 483 U.S. 635, 640, 641 (1987) ("reasonable officer").

18. See, e.g., *Anderson*, 483 U.S. at 641; *Harlow*, 457 U.S. at 815-20.

19. See, e.g., *Anderson*, 483 U.S. at 641.

20. See *id.* at 640-41; *DiMeglio v. Haines*, 45 F.3d 790, 803 (4th Cir. 1995).

21. See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (*per curiam*); *Malley v. Briggs*, 475 U.S. 335, 341-43 (1986).

22. See, e.g., *Anderson*, 483 U.S. at 640-41.

23. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985).

24. *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (quoting *Harlow*, 457 U.S. at 806). Other considerations, such as deterring able candidates from serving in public roles in the first place, have also been mentioned. See, e.g., *Harlow*, 457 U.S. at 814.

various costs of having to defend their conduct in lengthy litigation.²⁵ Thus, qualified immunity, or at least the objective character of the test for qualified immunity, is said to permit the prompt defeat of insubstantial or baseless claims.²⁶

Whether the current legal standard for qualified immunity actually achieves these goals is, as we shall see, doubtful in the extreme.²⁷ Qualified immunity law is in reality a general failure on its own terms. Even if these goals were actually served by qualified immunity doctrine, however, we could not then simply rest content. The Qualified immunity doctrine involves very substantial costs. The Supreme Court has recognized that qualified immunity must be traded off against the goals of "detering public officials' unlawful actions and compensating victims of such conduct."²⁸ What the Court has not been willing to recognize is that these costs are large and do not fall randomly across the broad public. Qualified immunity law has identifiable patterns of distinctive victims. Those disproportionately burdened by qualified immunity law tend to be those groups and causes that are burdened and subordinated by the law more generally. Qualified immunity law thus reinforces patterns of group subordination and generally, though not invariably, operates to slow the rate of social change.

This article will thus trace the failures of qualified immunity, both on their own terms and with respect to broader issues of social justice. It is possible for courts to respond to any such critique by claiming that they lack the power to judicially change these patterns of immunity in meaningful ways. Courts may claim to be helplessly bound by some clear congressional intent regarding immunities, or by long-established common law patterns of immunity.²⁹ In reality, it is implausible for the courts at this point to claim to be prisoners of clear congressional intent or of historical

25. See, e.g., *Johnson*, 515 U.S. at 312; *Siegert*, 500 U.S. at 232 ("One of the purposes of immunity . . . is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit"); *Acierio v. Cloutier*, 40 F.3d 597, 608 (3d Cir. 1994) (en banc); *Bartlett v. Fisher*, 972 F.2d 911, 914 (8th Cir. 1992).

26. See *Behrens*, 519 U.S. at 305; *Harlow*, 457 U.S. at 813, 819; *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1366 (11th Cir. 1998) (referring to "the fear of constant baseless litigation"); *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996).

27. See discussion *infra* Parts II-VII.

28. *Elder*, 510 U.S. at 515.

29. See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993) (quoting *Tower v. Glover*, 467 U.S. 914, 922-23 (1984)).

traditions of immunity.³⁰ And even if the courts consider themselves powerless to change immunity law, Congress itself could easily expand and contract the scope of immunities through statutory means.³¹

II. BURDENS OF PROOF AND APPEALABILITY: MODEST PRELIMINARY COMPLICATIONS

In theory, the burdens of proof regarding qualified immunity are straightforward and non-controversial. Here is a typical statement:

When a section 1983 defendant raises the defense of qualified immunity on summary judgment, the plaintiff must show the law was clearly established when the alleged violation occurred and must come forward with sufficient facts to show the official violated that clearly established law. The defendant bears the normal summary judgment burden of showing no material facts that would defeat the qualified immunity defense remain in dispute.³²

There is logic in requiring the plaintiff to offer some single published case establishing the plaintiff's right, rather than requiring the defendant to show that none of the thousands of potentially relevant cases actually does establish the plaintiff's right. But let us begin with the humble problem of the casual displacement of the burden of production. Consider, for example, the perhaps entirely offhand declaration by a unanimous Eighth Circuit panel that a defendant "is entitled to qualified immunity from [plaintiff's] equal protection claim if [defendant] can prove that his 'conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"³³ This is a casual and perhaps even unintended shift of a burden of production.

30. See for example, the thorough discussion in David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search For the Legislative Will*, 86 Nw. U.L. REV. 497, 499 (1992). See also *Richardson v. McKnight*, 521 U.S. 399, 409 (1997) (discussing current consensus on looking to both historical patterns of immunity law and public policy concerns in determining congressional intent regarding § 1983 immunities); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981) (same).

31. See, e.g., *Pulliam v. Allen*, 466 U.S. 522, 543 (1984) ("It is for Congress, not this Court, to determine whether and to what extent to abrogate the judiciary's common-law immunity.").

32. *Foote v. Spiegel*, 118 F.3d 1416, 1424 (10th Cir. 1997); see also, e.g., *Williamson v. City of Virginia Beach*, 786 F. Supp. 1238, 1261-62 (E.D. Va. 1992).

33. *Hansen v. Rimel*, 104 F.3d 189, 190 (8th Cir. 1997). The *Hansen* court quotes *Harlow*, 457 U.S. at 818, but neither the actually quoted passage nor the rest of *Harlow* support the apparent placement of the burden of proof in *Hansen*.

Such casual displacements of burdens of proof may often be harmless, but they can also introduce uncertainty and indeterminacy into the law of qualified immunity. Additional uncertainties, not to mention additional costs and delays, are then introduced by questions of the availability of interlocutory appeals of qualified immunity determinations. It is occasionally suggested that qualified immunity presents "a pure question of law,"³⁴ and is therefore "always capable of decision at the summary judgment stage."³⁵

Legal reality, however, is hardly so simple. Courts recognize that a defendant may be entitled to qualified immunity on the defendant's version of the facts, but not on the plaintiff's version of the facts.³⁶ Whether a defendant violated the plaintiff's clearly established rights may turn upon a disputed factual question of what the defendant actually did. For example, the nature and degree of force actually applied by an arresting officer may be in dispute. In this sort of case, discovery and perhaps credibility-based findings of fact must be made before a defendant could be entitled to qualified immunity,³⁷ even if part of the reason for qualified immunity is to protect defendants from the burdens of discovery.³⁸

The courts thus must often allow discovery in order to determine whether the defendant is entitled to benefit from an immunity doctrine the purpose of which is largely to avoid discovery. In addition to this self-undermining of qualified immunity, further complications concerning appealability arise. Some kinds of qualified immunity questions are appealable on an interlocutory basis, but others are not. In particular, questions of evidentiary sufficiency, or of what sorts of facts may be provable at trial, are generally not subject to interlocutory appeal.³⁹ On such issues, burdensome discovery, again, may be required.⁴⁰ On the other hand, interlocutory review of qualified immunity claims raising only abstract questions of law is generally available.⁴¹ Even assuming that the distinction between questions of evidentiary sufficiency and of abstract law cannot itself be litigated, further complications and delays are raised by the possibility of suc-

34. See, e.g., *DiMeglio*, 45 F.3d at 794 (citing *Harlow*, 457 U.S. at 818).

35. *Id.* at 794 (quoting *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992)).

36. See, e.g., *DiMeglio*, 45 F.3d at 795.

37. See *id.*; *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir. 1994).

38. See *DiMeglio*, 45 F.3d at 795; *Johnson*, 515 U.S. at 312; *Mitchell*, 472 U.S. at 525-28.

39. See, e.g., *Johnson*, 515 U.S. at 313.

40. See *id.* at 316; *Knox v. Southwest Airlines*, 124 F.3d 1103, 1106-07 (9th Cir. 1997) (citing *Armendariz v. Penman*, 75 F.3d 1311, 1317 (9th Cir. 1996) (en banc)).

41. See, e.g., *Behrens*, 516 U.S. at 307; *Foy*, 94 F.3d at 1531 n.3.

cessive motions for summary judgment, on a qualified immunity theory, based on the evolving state of the record in a given case.⁴²

These complications and uncertainties, however, are modest by comparison with those involving pure questions of law. Pure questions of law in the qualified immunity area are often more nearly pure in their uncertainty, indeterminacy, and in their conscious or unconscious manipulability than in any other respect. The various indeterminacies, any single one of which by itself seems manageable, in combination leave remarkable room for judicial bias and manipulation of qualified immunity law, and consequently of the scope and protection of constitutional and statutory rights.

III. CONSTITUTIONAL BALANCING TESTS: HOW MUCH LAW CAN BE CLEARLY ESTABLISHED?

Over the last half-century, constitutional law has increasingly involved one form of balancing test or another.⁴³ Balancing tests leave ample scope for legal indeterminacies. But we must not suppose that constitutional tests that avoid, or appear to avoid, balancing must be more determinate, clear, and predictable in their outcomes. For example, a shocks-the-conscience test for substantive due process violations at least appears to avoid balancing of interests, but is nonetheless indeterminate and subjective in application.⁴⁴

Balancing tests offer what might be called the clearest cases of lack of clarity of the law. The opportunity for the exercise of judicial bias is evident. But even more important is the general and systematic bias of balancing tests against plaintiffs, given the nature of the test for qualified immunity. To the extent that the results of judicial balancing tests are

42. See, e.g., *Knox*, 124 F.3d at 1106 (citing *Enlow v. Tishamingo County*, 962 F.2d 501, 506-07 (5th Cir. 1992)); *DiMeglio*, 45 F.3d at 795 ("After discovery and upon a proper motion, the district court may reconsider the question of qualified immunity.").

43. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44 (1987) (referring to "a form of constitutional reasoning—balancing—that has become widespread, if not dominant, over the last four decades"). See also Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 264 (1995) ("While the Supreme Court has adopted the open-ended standard governing qualified immunity for public officials, it has also increasingly articulated its substantive constitutional directives as balancing tests."); David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U.L. REV. 641, 644 (1994) ("As currently practiced . . . balancing is mired in a bog of indeterminacy.").

44. See *Mays v. City of East St. Louis*, 123 F.3d 999, 1001 (7th Cir. 1997) ("The district court in this case adopted a shocks-the-conscience approach. After concluding that the events did not make his conscience tingle, the judge entered judgment for [defendants].").

difficult to predict, it is therefore difficult to say that the plaintiff's right was clearly established at a specific level. This is all the defendant needs for qualified immunity. The law is, in this respect, biased against the real enforceability of even the most widely popular, uncontroversial general constitutional rights. The law of qualified immunity is even more dramatically biased against the real enforceability of emerging, newly recognized, or controversial constitutional and other federal rights.

Consider, for example, the case of allegedly unconstitutional activity engaged in by state officials investigating alleged child abuse. The underlying substantive law must in some way balance the rights and interests of parents, the child, and of the public. Almost any sensitive balancing test, however, will lead to specific results that are difficult to predict. If the rights of the plaintiff must have been clearly established at a specific level to defeat qualified immunity, the claim of qualified immunity will ordinarily prevail in such cases, and the plaintiff's rights will therefore go unvindicated.⁴⁵

The more subject a right is to being balanced away under specific case circumstances, the less likely such a right will have been clearly established at a specific level by prior reported case law. One court has expressed the problem in these terms:

The need to continually subject the assertion of this abstract substantive due process right to a balancing test which weighs the interest of a parent against the interests of the child and the state makes the qualified immunity defense difficult to overcome. Moreover, the requirement that the right be clearly established at the time of the alleged violation is particularly formidable.⁴⁶

This problem is hardly confined to the substantive due process context. Determining whether probable cause exists to support an arrest, for example, may involve a police officer's weighing particular factors in specific circumstances.⁴⁷ This does not mean that arresting officers will always be able to invoke qualified immunity to shield their mistaken judg-

45. See *Anderson*, 483 U.S. at 640-41; *Martinez v. Machir*, 35 F.3d 1486, 1490 (10th Cir. 1994); *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc).

46. *Manzano v. South Dakota Dep't of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995); see also *Callahan v. Lancaster-Lebanon Intermediate Unit 13*, 880 F. Supp. 319, 329 (E.D. Pa. 1994) ("[M]any courts have found that, in the context of child care workers investigating and bringing child abuse proceedings, there are no 'clearly established' substantive due process rights held by parents."). The court in *Manzano* did not go so far as to endorse the latter dictum in *Callahan*. See *Manzano*, 60 F.3d at 510.

47. *Ripson v. Alles*, 21 F.3d 805, 808 (8th Cir. 1994).

ments concerning the existence of probable cause.⁴⁸ But arresting officers will generally be entitled to qualified immunity "if the arrest was objectively reasonable—if a reasonable officer could have believed probable cause existed for the arrest."⁴⁹

The law's emphasis on reasonableness tends to complicate the lawsuit, to emphasize the role of specific fact and circumstance and thus to insulate defendants from liability. This is in part because two levels of reasonableness can be distinguished in probable cause cases, and these two levels of reasonableness operate jointly to insulate defendants. The presence or absence of probable cause, to begin with, is itself merely a requirement of reasonable judgment.⁵⁰ The arresting officer need not assume that the defendant will be found guilty beyond a reasonable doubt on all the charged elements.⁵¹ Probable cause is thus at some distance from actual criminal convictability.⁵²

The standard for qualified immunity in probable cause cases is then a separate inquiry, and it introduces a further accommodation of the defendant's conduct. In effect, the qualified immunity standard asks whether the arresting officer's mistake in believing probable cause to be present was itself, under the circumstances, a reasonable one. One might ask whether the defendant reasonably acted unreasonably, but this would be unnecessarily paradoxical.⁵³ The problem is not one of paradox. One can certainly make a reasonable mistake or an unreasonable mistake about where a borderline lies.

48. See, e.g., *id.* ("Based on all of the facts and circumstances within [the defendant's] knowledge and of which he had reasonably trustworthy information at the time of the arrest, a reasonable officer could not have believed probable cause existed for the arrest of [the plaintiff] . . ."). Note, incidentally, the further complication of including what a reasonable officer should or would have known under the circumstances, beyond that which the officer actually did know.

49. *Id.* (citing *Hunter*, 502 U.S. at 228-29).

50. See, e.g., *Ripson*, 21 F.3d at 808; *Hunter*, 502 U.S. at 228 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

51. For discussion of this more rigorous criminal law standard, see, for example, *Patterson v. New York*, 432 U.S. 197, 204 (1977); *In re Winship*, 397 U.S. 358, 364 (1970).

52. Compare the standards elaborated in the sources cited *supra* note 50 with those in the sources cited *supra* note 51.

53. See *Anderson*, 483 U.S. at 643; *Oliveira*, 23 F.3d at 649 & n.2. Judge Jon O. Newman, who wrote the opinion in *Oliveira*, is also the author of the concise and stimulating article *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy For Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978). For a strong claim of paradox or contradiction in this context, see David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 50-51 (1989).

In this case, the reasonable mistake would be about where the border lies between a reasonable, probable cause-based arrest and an unreasonable arrest without probable cause. Police might, for example, have either reasonably mistaken or unreasonably mistaken beliefs about the point at which the reasonable speed of an accelerating car becomes unreasonable, given the driving conditions. A judgment that the borderline speed is ninety miles per hour would likely be an unreasonable mistake. A judgment that the border between a reasonable and an unreasonable speed is forty-five miles per hour could, on the other hand, often be deemed a reasonable mistake.

Thus, the problem with applying qualified immunity standards to probable cause determinations is not one of paradox, but of overprotectiveness of many defendants and underprotectiveness of constitutional rights. A similar effect is seen commonly in cases involving government discipline of employees based on employee speech. These sorts of cases are known as *Pickering* balancing cases.⁵⁴ The underlying constitutional balancing test weighs the employee's and the public's interest in the employee's commenting on matters of genuine public concern against the government employer's interest in workplace efficiency and morale.⁵⁵

Some courts have recognized the crucial effect that use of the *Pickering* balancing test has on whether the employee's free speech rights can be said to have been clearly and specifically established.⁵⁶ Given the need to weigh and balance, "the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful."⁵⁷

The *Pickering* standard may be verbally clear in some general sense, but its application normally is so fact sensitive as to immunize the government employer.⁵⁸ Of course, in some cases, egregious facts, damaging employer admissions, or an unusually pro-employee or pro-speech court may result in a finding that the outcome of the *Pickering* balancing should have been clear to any reasonable employer.⁵⁹ But such situations are not typi-

54. This term is derived from the case of *Pickering v. Board of Education*, 391 U.S. 563 (1968).

55. *Pickering*, 391 U.S. at 568; *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 142 (1983).

56. *Williams v. Alabama State Univ.*, 102 F.3d 1179 (11th Cir. 1997).

57. *Id.* at 1183 (per curiam) (quoting *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989)).

58. See *Rakovich*, 850 F.2d at 1213.

59. See *Bartlett*, 972 F.2d at 918 n.3; *Rakovich*, 850 F.2d at 1213; *Bennis v. Gable*, 823 F.2d 723, 733 (3d Cir. 1987).

cal. As has been suggested, more commonly "the facts of the existing caselaw must closely correspond to the contested action before the defendant official is subject to liability."⁶⁰ The failure of a defendant's qualified immunity claim in this area is thus relatively rare.⁶¹

However, the complexity and sheer manipulability of the employee speech cases is not always exhausted by the balancing test itself. Two brief examples should suffice. First, it is commonly held that for the government employee's speech even to qualify for the *Pickering* balancing test, the speech must address some matter of public, as opposed to merely personal, interest.⁶² Some courts, however, have redescribed this test in order to expand further the scope of qualified immunity and contract the enforceable scope of government employee speech rights.⁶³ Such courts attach little or no weight to the public interest or importance of the employee speech.⁶⁴ Instead, they attempt to ask whether the government employee was speaking in the capacity of citizen, or of government employee.⁶⁵

However, this attempted distinction is often not merely difficult or pointless, but wrongheaded. Speech of the greatest public importance may deserve protection even though spoken only because of the speaker's status, special knowledge, experiences, and insights obtained as a public employee. Some public employees may even have a duty to report on such matters.⁶⁶ It is difficult to believe that we want to inhibit true and important revelations, with little cost to the government workplace, merely because a court wishes to say that the speech was made in the role of a government employee and not as a citizen. Nor should we qualifiedly immunize those with only modest grounds for disciplining government employees.

The manipulability of the qualified immunity doctrine in employee speech cases is displayed in a different way in *Burnham v. Ianni*, in which

60. *Rakovich*, 850 F.2d at 1213.

61. See, e.g., *Grantham v. Trickey*, 21 F.3d 289, 292, 293 (8th Cir. 1994); *Bartlett*, 972 F.2d at 916 ("[A]t least five circuits have concluded that, because *Pickering*'s constitutional rule turns upon a fact-intensive balancing test, it can rarely be considered 'clearly established' for purposes of . . . qualified immunity . . .").

62. See, e.g., *Rankin*, 483 U.S. at 388; *Connick*, 461 U.S. at 143, 147; *Kincade v. Blue Springs*, 64 F.3d 389, 395 (8th Cir. 1995). See also R. GEORGE WRIGHT, *THE FUTURE OF FREE SPEECH LAW* ch. 7 (1990).

63. See, *DiMeglio*, 45 F.3d at 805; *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986).

64. See *supra*, note 63.

65. See *DiMeglio*, 45 F.3d at 805; *Terrell*, 792 F.2d at 1362.

66. See, e.g., *In re Linsey*, 148 F.3d 1100, 1110-11 (D.C. Cir. 1998); *Doe v. Rains County Ind. School Dist.*, 66 F.3d 1402, 1417 (5th Cir. 1995).

the en banc Eighth Circuit Court of Appeals rejected a claim of qualified immunity.⁶⁷ In *Burnham*, the defendant, a state university chancellor, ordered the removal of certain photographs from a university departmental display case.⁶⁸ The court concluded that even if the display case constituted a non-public forum, removing the photographs was unconstitutional as a viewpoint-based restriction, since the chancellor was held to have ordered the removal based on his opposition to the views expressed by the photographs.⁶⁹ Oddly, the court then went on to concede that the removal was actually not viewpoint-based in this sense.⁷⁰ The photographs, which conveyed the interest of two history faculty members in military history, "essentially supported University operations and extolled the capabilities and interests of certain faculty members."⁷¹

Actually, the chancellor's motive seems to have been to avoid controversy, possible disruption, campus fear and upset, and other possible reactions by sundry other members of the university community.⁷² Some or all of those other members of the university community may have been motivated in whole or in part by their own points of view regarding the photographs on display. But it is obvious—or at least reasonably arguable—that this does not turn the chancellor's removal, for the sake of avoiding controversy, into a viewpoint-based restriction. There was no indication that the chancellor opposed any message conveyed by the display.⁷³ As the court recognized, a controversy or divisiveness-based rationale is in this sense content-neutral and might also support the suppression of views critical of those conveyed by the display.⁷⁴ Whatever the best analysis or result would have been in *Burnham*, it is difficult to see a restriction as viewpoint-based where the reason for the restriction could just as easily encompass any contrasting or conflicting message. To suppose that the court's analysis, over the general dissent of two circuit judges, is so obvious as to

67. 119 F.3d 668, 668 (8th Cir. 1997) (en banc).

68. See *Burnham*, 119 F.3d at 672.

69. *Id.* at 675-76.

70. See *id.* at 678.

71. *Id.* at 678 n.18.

72. See *id.* at 676, 680.

73. See *id.* at 678 n.18.

74. *Burnham*, 119 F.3d at 679 ("Such a holding would presumably permit the suppression of . . . advocacy of gender and cultural diversity if [the chancellor] felt that such speech contributed to an inefficient and negative working and learning environment on the campus . . .").

be clear in advance to the defendant is simply to further illustrate the manipulability of qualified immunity doctrine.⁷⁵

IV. LEVEL OF GENERALITY PROBLEMS: THE COMMON UNDERCUTTING OF RIGHTS ENFORCEABILITY AGAINST A BROADER BACKGROUND OF MANIPULABILITY

As we have seen, a defendant forfeits qualified immunity if the right violated was clearly established, at a fairly specific level, at the time of the defendant's act.⁷⁶ Inescapably, this standard provides room for more or less arbitrary manipulation by courts, while jeopardizing practical enforceability of basic federal rights. Much of the problem stems from the fact that "[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified."⁷⁷

It is all very well to suggest that the relevant right asserted by the plaintiff must have previously been established at a fairly specific level. To formulate the relevant right at a very general level would be to ask, pointlessly, whether the defendant should have known that it was unconstitutional to engage in a false arrest, or an unreasonable search or seizure, or to inflict cruel and unusual punishment. Whatever the virtues of such an approach, it is hardly compatible with qualified immunity.⁷⁸ Officials know that unreasonable searches are barred. What they may not know are the boundary lines between reasonable and unreasonable searches in particular, concrete contexts.

So, if we are interested in critiquing qualified immunity doctrine, it seems we ought to focus on specific rights and specific acts in specific contexts.⁷⁹ But this is not a mechanical, uncontroversial process. It is possible to misdescribe an action through too much specificity.⁸⁰ Describing

75. *Id.* at 681 (McMillian, J. and Gibson, J., dissenting).

76. See *supra* note 20 and accompanying text.

77. *DiMeglio*, 45 F.3d at 803; see also *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996) (referring to the level of generality problem).

78. See, e.g., the sources cited *supra* note 20. But compare *Murphy v. State*, 127 F.3d 750 (8th Cir. 1997), in which the court appears to have focused rather generally on whether invidious racial discrimination by the state was clearly established as impermissible. See *id.* at 755. The court refers to "reasonably specific allegations" by the plaintiff, but does not go on to discuss such allegations or consider whether those specifically alleged acts would have violated clearly established law.

79. See, e.g., *Rakovich*, 850 F.2d at 1209 ("[T]he test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted.").

80. See, e.g., *Newell*, 79 F.3d at 117 n.3 ("The prison officials' definition of the right is too narrow To accept their definition of the right at issue, 'would be to allow appel-

an act of enslavement, for example, partly by reference to the names, ages, or home towns of the parties may, for some purposes, be a worse rather than a better, if more specific, description. Thus the law recognizes that qualified immunity can be lost even where what the defendant specifically did had not previously been declared illegal.⁸¹ As Chief Judge Richard Posner of the Seventh Circuit Court of Appeals has colorfully expressed the point: "[T]he police cannot obtain immunity for liability for false arrests by arresting people on preposterous charges and then pointing to the absence of any judicial decision that declares the statutory interpretation underlying the charges to be preposterous. Their interpretation must be reasonable in light of existing law."⁸²

Where generally relevant precedent is available, some courts have "requir[ed] some, but not precise factual correspondence with precedent, and demand[ed] that officials apply general, well-developed legal principles."⁸³

These formulations allow some room for concern for enforcing basic citizen rights at the expense of government actors, particularly for courts so disposed.⁸⁴ As well, these formulations enhance the legitimacy of the judicial system by avoiding embarrassing results in extreme or in Chief Judge Posner's terms, "preposterous cases."⁸⁵ A qualified immunity rule that immunized contemporary slaveholding government officials, on the theory

lants, and future defendants, to define away all potential claims.") (quoting *Kelly v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995)).

81. See, e.g., *United States v. Lanier*, 520 U.S. 259, ___, 117 S. Ct. 1219, 1227 (1997) (criminal civil rights case) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other circumstances a general constitutional rule already identified in the decisional law may apply with obvious clarity . . . even though 'the very action in question has [not] previously been held unlawful.'" (quoting *Anderson*, 483 U.S. at 640); *id.* at 1227 ("There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from . . . liability.") (quotations omitted); *Harris v. Roderick*, 126 F.3d 1189, 1203 (9th Cir. 1997) ("[The plaintiff] need not present a factually similar case in order to show that his constitutional rights were clearly established."); *Mendoza v. Block*, 27 F.3d 1357, 1357 (9th Cir. 1994).

82. *Northen v. City of Chicago*, 126 F.3d 1024, 1028 (7th Cir. 1997).

83. *Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997) (quoting *J.H.H. v. O'Hara*, 878 F.2d 240, 243 (8th Cir. 1989)); *Waddell v. Forney*, 108 F.3d 889, 894-95 (8th Cir. 1997) (quoting *J.H.H.*, 878 F.2d at 243).

84. For a case in which preexisting law not precisely on point was carried about as far as one typically finds, see *Hayes v. Long*, 72 F.3d 70, 73-74 (8th Cir. 1995). In *Hayes*, the court simply concluded that prior rulings against requiring Muslim prisoners to eat pork or pork-contaminated food also clearly forbade requiring Muslim prisoners to physically handle such items, presumably with or without gloves. See *id.* at 73-74.

85. *Northen*, 126 F.3d at 1028.

that no actual case precedent had put the officials on notice, would simply be appalling. Such a rule would jeopardize the stability of the broader qualified immunity rule in less extreme, more debatable contexts, and ultimately would not serve the interests even of government officials.

Once the extreme cases are provided for, however, courts so inclined can insist upon very specific prior case law guidance for the defendant. In this mood, courts can begin by pointing to the Supreme Court's principle that "the qualified immunity defense has evolved to provide 'ample protection to all but the plainly incompetent or those who knowingly violate the law.'"⁸⁶ "Plain incompetence" suggests an ongoing basic unfitness, beyond simply making a single constitutionally bad decision. And a "knowing violation" standard aims only at sheer villainy, and even then protects villainy where the law was hazy. After all, one cannot knowingly violate a rule where the rule's applicability is unclear. One might even hope that one's conduct in such a case would turn out to be illegal, but one cannot knowingly violate a rule of unknowable applicability.

From there, it is a simple matter to marginalize the principle that officials must apply general, well-established legal principles even if a closely corresponding case has not previously been reported.⁸⁷ Not all legal inferences are clear, determinate, and uncontroversial. Given this indeterminacy, "[i]t is not . . . enough to demonstrate that the constitutional norm relied on is the logical extension of principles and decisions already in the books."⁸⁸ Rather, to lose qualified immunity requires that "preexisting law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated reasonable government agent that what defendant is doing violates federal law in the circumstances."⁸⁹ This grants broad latitude to defendants.

For a sense of how this latitude can play out in practice, consider the circumstances in *Jenkins v. Talladega City Board of Education*.⁹⁰ Jenkins involved an allegedly repeated strip search by school personnel of two

86. *Acierno*, 40 F.3d at 616 (quoting *Malley*, 475 U.S. at 341).

87. See *supra* notes 80-83 and accompanying text.

88. *Sweaney v. Ada County*, 119 F.3d 1385, 1390 (9th Cir. 1997) (internal quotes omitted) (quoting *Somers v. Thurman*, 109 F.3d 614, 621 (9th Cir. 1997)). But compare to *Hayes*, 72 F.3d at 70, for a classic case of requiring an official to extend a prior rule interestingly.

89. *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823 (11th Cir. 1997) (en banc) (quoting *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)).

90. 115 F.3d 821 (11th Cir. 1997) (en banc). For discussion, see *Recent Case*, 111 HARV. L. REV. 1341 (1998).

eight year old second grade public school students.⁹¹ The object of the alleged strip searches was the sum of \$7.00 allegedly stolen from a third student's purse.⁹² Despite initial unsuccessful searches in other places the money was declared to have been placed, the alleged strip searches proved fruitless.⁹³ The children's parents then sued for, among other causes of action, § 1983 violations.⁹⁴

Perhaps understandably, there was not much factually-similar reported case law upon which to draw. The closest applicable case was actually deemed to be *New Jersey v. T.L.O.*⁹⁵ *T.L.O.*, however, involved the search of a high school student's purse for cigarettes.⁹⁶ Even the most careful balancing test drawn from the context of a search of a purse is unlikely to address sensitively a first or second strip search of a young child. All such a test could offer would be general guidance. The court in *Jenkins* could have found the alleged circumstances of the strip searches sufficiently egregious in themselves to have put the school officials adequately on notice. Instead, the court focused on the differences in the case facts between *Jenkins* and *T.L.O.* It concluded that "[p]ublic officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases."⁹⁷ In particular, "school officials cannot be required to construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority."⁹⁸

Thus, the en banc Eleventh Circuit Court of Appeals rejected the enforcement of the students' privacy or reasonable search and seizure rights under § 1983. Instead, the school official defendants received qualified immunity based essentially on a legal indeterminacy theory.⁹⁹ Qualified immunity doctrine plainly draws much of its breadth and power from legal

91. 115 F.3d at 822-23.

92. *Id.* at 822.

93. *Id.*

94. *Id.* at 823.

95. 469 U.S. 325 (1985).

96. *See id.* at 328; *Jenkins*, 115 F.3d at 823-24.

97. *Jenkins*, 115 F.3d at 827 (internal quotes omitted) (quoting *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting), *dissent approved en banc*, 998 F.2d 923 (11th Cir. 1993) (per curiam)); *Jones v. City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997).

98. *Jenkins*, 115 F.3d at 827.

99. For merely a few citations from the extensive literature on the scope and implications of legal indeterminacy, see, for example, Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481 (1995); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

indeterminacy. To the extent that the law, including basic constitutional rights claims, can be seen as indeterminate at the level of specific judicial decisions, qualified immunity is strengthened and extended, and the enforcement of basic federal rights is undercut.¹⁰⁰ Legal indeterminacy is thus not a neutral phenomenon. As we shall see below, it feeds into the qualified immunity issue to impede the development of the law and the enforcement of both controversial and uncontroversial substantive rights.

V. WHICH COURTS COUNT?: A FURTHER SOURCE OF ARBITRARINESS

The question of when the law on a particular point is clearly established is itself unclear, in several respects. This lack of clarity about when the law is clear in turn leaves qualified immunity law unclear, and opens the door to arbitrariness in the enforcement of basic rights. The problem can be introduced by asking whether all courts count in establishing the relevant substantive law, and if not, how judges know which courts do count. Depending on the answers, judges may then have to ask whether the decisions of the relevant courts count equally or whether the relevant courts have some hierarchy of influence in establishing substantive law.

This question was posed some time ago in the following terms: "[S]hould our reference point be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts, or all of the foregoing?"¹⁰¹ Courts have diverged broadly on the range of the courts whose decisions may be considered.¹⁰² The Supreme Court has offered some limited guidance on the matter. In particular, the Court took up the problem in a criminal law context in *United States v. Lanier*.¹⁰³ *Lanier* establishes that courts other than the Supreme Court can clearly establish the law.¹⁰⁴ The *Lanier* opinion seems well-disposed to according some weight, in appropriate cases, not only to the federal appellate court controlling the particular jurisdiction in question, but to other federal appellate courts as well, and even to other unspecified courts.¹⁰⁵ *Lanier*, however, does not speak with great detail or decisiveness on these questions.¹⁰⁶

100. For distinct perspectives, see, for example, the sources cited *supra* note 99.

101. *Hobson v. Wilson*, 737 F.2d 1, 25-26 (D.C. Cir. 1984).

102. For a brief survey of several of the narrower and broader approaches, see *Williamson*, 786 F. Supp. at 1261-62.

103. 520 U.S. 259, 259 (1997).

104. See *id.* at 1226 ("[W]e think it unsound to read *Screws* as reasoning that only this Court's decisions could provide the required warning.").

105. See *id.* at 1226-27.

106. See *id.*

Some courts have taken a relatively broad approach to the question of which courts can establish the law for qualified immunity purposes. The Ninth Circuit Court of Appeals, for example, has held that "in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits and district courts."¹⁰⁷ The Ninth Circuit has, however, added a further complication. The courts may also factor in "a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue."¹⁰⁸

Let us pause to consider the consequences for the protection of basic rights of a broad, inclusive approach to the question of which courts can clearly establish those rights. It may be tempting for courts to assume that the greater the number of courts that may be looked to, the greater the protection of basic rights. After all, the more courts that may be drawn upon, the more likely a factually and legally similar prior case has arisen. Similar prior cases, of course, are a primary way of clearly establishing the law.¹⁰⁹

A larger number of prior cases, from a wider range of separate jurisdictions, is, however, a mixed blessing for civil rights plaintiffs. All else equal, the greater the number of cases already decided, the easier it will be for the defendant to find a case arguably in conflict with any case cited by the plaintiff, thereby perhaps undermining the clarity with which the plaintiff's legal principle is established. Suppose that the Ninth Circuit has clearly held that a particular constitutional right exists. The plaintiff can then hardly benefit from considering the other appellate circuits. Perhaps another circuit has held contrary to the Ninth Circuit, or the results are mixed, or most dramatically, the Ninth Circuit view turns out to be the distinct minority position. Can the Ninth Circuit then still say that the law is clearly established, whatever other courts say? In this respect, broadening the range of courts and jurisdictions considered undermines the protection of basic rights.

107. *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988) (internal quotes omitted) (quoting *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986)). See also *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995) (quoting *Vaughan v. Ricketts*, 859 F.2d 736, 739 (9th Cir. 1988)). The Eighth Circuit adopted similar language in *Burnham*, 119 F.3d at 677 ("[I]n the absence of binding precedent, a court should look to all available decisional law including decisions of state courts, other circuits and district courts . . .") (quoting *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993)).

108. *Tribble*, 860 F.2d at 324 (internal quotes omitted) (quoting *Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985)).

109. See, e.g., *Lanier*, 520 U.S. at ___, 117 S. Ct. at 1226-27.

The Ninth Circuit's position is actually even less supportive of basic rights claims than this language alone would suggest. Ninth Circuit courts have, again, concluded that "[a]n additional factor that may be considered is a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue."¹¹⁰ Realistically, the likely overall effect of such consideration would be to enhance the prospects for qualified immunity and undercut rights enforcement. Let us briefly see why.

It is admittedly possible for a court to apply this factor in a rights-promotive way. A court wishing to determine whether a given right was clearly established might, for example, find a single non-binding decision on point, and in favor of the right. The court could then posit, with ringing confidence, that the Ninth Circuit or the Supreme Court would assuredly reach the same result, and conclude that the right is therefore clearly established.¹¹¹ But even in this extreme case, much of the work is being done by the apparent rightness of the single actual decision on point. Why not simply say that a decision so convincing that we may conclude that it would be followed elsewhere is a decision that itself clearly establishes the law? Perhaps this would assign too much weight to the decision by itself, and not enough to its being followed elsewhere. But even if so, the risks to rights enforcement of encouraging judicial speculation about Ninth Circuit or Supreme Court holdings must also be considered.

Commonly, a judicially predicted, future Ninth Circuit decision may only confirm the clearly established judgments of other courts. A judge may thus simply predict that the Ninth Circuit would do what other courts have already done. Or the Ninth Circuit, no less than any other circuit, may disagree with or cast doubt upon law that is clearly established elsewhere. The Ninth Circuit may simply weigh in on one side of a disputed question of legal rights, as might any other circuit. The Ninth Circuit may often take an expansive approach to basic federal rights. But in none of these instances would a judicially predicted Ninth Circuit opinion clearly establish the plaintiff's right, thereby overcoming a claim of qualified immunity. Neither, in any of these cases, would a real Ninth Circuit opinion. One circuit, for example, cannot clearly establish the law by disagreeing with less rights-protective decisions from other circuits. One court's recognizing a constitutional right may be a progressive step, while adding nothing to or even reducing the clarity of the law in that respect. To recognize a right for

110. *Tribble*, 860 F.2d at 324 (quoting *Capoeman*, 754 F.2d at 1515).

111. *See id.*

the first time may well be to add conflict and uncertainty to the overall state of the law.

As well, let us bear in mind the possibility that a judge within the Ninth Circuit might find only non-binding decisions on point, all upholding the claimed right, but then find the right not clearly established, based on the judge's guess that the Ninth Circuit, or the Supreme Court, would likely hold to the contrary if given the opportunity. Referring to what the Ninth, or any other, Circuit might hold thus may undercut the clarity of otherwise established law. There is no rule that judges must guess that their own circuit would be more rights protective than other courts have been. And let us not ignore the possibility that a judge may believe both that the Ninth Circuit would uphold a given rights claim, but that the Supreme Court would not, thus again upholding the defendant's qualified immunity claim and undermining the enforceability of the right.¹¹² There is no rule that the Supreme Court will be more rights protective than, say, the Ninth Circuit.

The courts vary in subtle ways as to the range of courts whose decisions may be consulted in determining whether the law is clearly established. Courts vary as to whether the decisions of some or all state courts,¹¹³ federal district courts,¹¹⁴ or other federal courts of appeal¹¹⁵

112. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997) (reversing the en banc Ninth Circuit on a substantive constitutional right to assisted suicide); see also *Hunter*, 502 U.S. at 224 (reversing Ninth Circuit on an issue of the scope of qualified immunity of federal agents in a probable cause for arrest case).

113. See, e.g., *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1049 (8th Cir. 1989) (apparently providing for consideration of foreign state court and foreign federal district court opinions, among others); *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988) (requiring a decision by "the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court," thereby apparently excluding local state courts of appeal and foreign state supreme and appellate courts along with federal district courts); *Capoeman*, 754 F.2d at 1514 (looking to "whatever decisional law is available," as opposed to considering only the Supreme Court, "appropriate" federal circuit courts of appeal, and "the highest state court") (citing, for the latter view, *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980)); *Ferguson v. Montgomery*, 969 F. Supp. 674, 677 (M.D. Ala. 1997) (requiring recourse to only the Supreme Court and the Eleventh Circuit Court of Appeals).

114. See, e.g., *Sweeney*, 119 F.3d at 1389 (referring to "binding authority" as at least one means of clearly establishing a right, which might presumably include local federal district courts); *Barton v. Norrod*, 106 F.3d 1289, 1293 (6th Cir. 1997) ("Ordinarily, when looking to see if a clearly established right exists, we look to the decisions of the Supreme Court, of this circuit, and of courts within our circuit for guidance," thus holding open the possibility of recourse to local and perhaps non-binding federal district court opinions.); *Brown v. Grabowski*, 922 F.2d 1097, 1118 (3d Cir. 1990) ("[L]one district court case from another jurisdiction" as insufficient to clearly establish the law at least in the given context.).

115. See, e.g., *Foote*, 118 F.3d at 1424 (allowing recourse to "the clearly established weight of authority from other courts"); *Jenkins*, 115 F.3d at 827 n.4 (requiring a local

should be considered. Nor is the law clear on such basic matters as whether a split in the federal circuit courts necessarily means that the law is not clearly established for qualified immunity purposes. On the one hand, such a circuit split seems the central case of lack of clarity in the law.¹¹⁶ But some judges may not want to admit that all such splits render the relevant law unclear, thereby automatically triggering qualified immunity nationwide. If any circuit split always renders the law unclear for qualified immunity purposes, then any single circuit can unilaterally veto, for all circuits, the enforcement of a given right, however otherwise widely recognized that right may be. Such a right would not be enforceable anywhere, as against a qualified immunity defense, until the Supreme Court itself addressed the issue.

This problem of a unilateral, nation-wide veto held by the least rights-protective court in any given context was briefly referred to in the Tenth Circuit case of *Garcia v. Miera*.¹¹⁷ Remarkably, the court determined that a conflict between federal circuits on some claim of right was admittedly relevant to the qualified immunity issue, but not by itself controlling.¹¹⁸ Crucially, the court recognized that a circuit split is not, in the qualified immunity context, a matter of neutrality or compromise; the split tends to dictate universal non-enforceability of the right in question.¹¹⁹ The ability of the least rights-protective court to universalize qualified immunity by undercutting the clear establishment of a right might even extend to the federal district court level as well.¹²⁰

Eleventh Circuit case as opposed to decisions of other federal courts of appeal); *Warner v. Grand County*, 57 F.3d 962, 964 (10th Cir. 1995) (quoting *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992); *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 n.6 (11th Cir. 1995) (citing *Courson v. McMillian*, 939 F.2d 1479, 1498 n.32 (11th Cir. 1991)); *Wallace*, 626 F.2d at 1161 (referring to "the appropriate United States Court of Appeals," as opposed, presumably, to other federal circuits); *Wright v. Butts*, 953 F. Supp. 1352, 1359 (M.D. Ala. 1996) (referring in particular to the Eleventh Circuit). It may be more understandable for circuits with relatively few constitutional and other federal rights cases to include other circuits as possible sources of law, as opposed to circuits with a greater number of such cases.

116. Note, for example, the Supreme Court's distinct inclination to seek to resolve such conflicts. See ROBERT L. STERN, ET AL., *SUPREME COURT PRACTICE* § 4.4, at 197-98 (6th ed. 1986).

117. 817 F.2d 650, 658 (10th Cir. 1987).

118. *Id.*

119. *Id.*

120. See *id.* at 658 n.11 (quoting *People of Three Mile Island v. Nuclear Regulatory Comm'n*, 747 F.2d 139, 144 (9th Cir. 1984)). Actually, it is imaginable that state law and state court decisions could further undermine the clarity of the law. See *Africa v. City of*

Ultimately, the most candid response to this veto problem is not to pretend that the law is clearly established even where there is an ongoing division in the federal circuits. Instead, as we shall conclude below,¹²¹ the better solution would be to more dramatically rethink the broader law of qualified immunity and of public civil rights liability in general.

VI. HOW QUICKLY MUST NEW LAW BE LEARNED?: PRACTICAL LIMITATIONS AS LIMITS ON THE ENFORCEABILITY OF BASIC FEDERAL RIGHTS

Let us simply assume that all of the problems noted above have been somehow resolved, and that the relevant law has just been specifically and authoritatively determined by a particular court. In some abstract, technical sense, the law is now clear. But is it realistic and fair to charge all governmental actors with instantaneous, clear knowledge and understanding of the import of that decision? Is it realistic and fair, for example, to require third grade public school teachers to learn of relevant court of appeals decisions on search and seizure law as quickly as state attorneys general?¹²² As a matter of fairness and realism, don't at least some government actor defendants deserve some "lag time" to inform themselves of relevant legal decisions by various courts?

Fairness and realism indeed have much to recommend them. Let us remember, however, that in this context, fairness and realism for the governmental actor defendant may mean that a violation of a plaintiff's vital constitutional rights may go without meaningful remedy. Let us remember as well that the legal system sometimes finds realism and fairness to be outweighed, as in some of the cases in which a criminal defendant's ignorance of the law is held to be no excuse.¹²³ Thus, in the context of qualified

Philadelphia, 49 F.3d 945, 970 (3d Cir. 1995) ("[S]tate law could help define the scope of federal law.").

121. See discussion *infra* Conclusion.

122. For the relevance of search and seizure law to the work of third grade public school teachers, see generally *Jenkins*, 115 F.3d at 821.

123. For discussion, see *Staples v. United States*, 511 U.S. 600, 622 n.3 (1994) ("If the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that . . . ordinary . . . mens rea . . . does not require knowledge that an act is illegal, wrong, or blameworthy.") *Pope v. Illinois*, 481 U.S. 497, 517 (1987) (Stevens, J., dissenting) (the above principle, however, "presupposes a penal statute that puts citizens on notice of what is illegal"); *Liparota v. United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting) ("It is the conventional position that ignorance of the existence, meaning or application of the law determining the elements of an offense is not an element of that offense . . ."); *Screws v. United States*, 325 U.S. 91, 129 (1945) (Rutledge, J., concurring) ("[S]tate officials know or should know when they pass the limits of their authority, so far at any rate that their ac-

immunity claims, courts must determine not only what fairness and realism as to learning new law require, but what weight, if any, to assign to fairness and realism regarding various sorts of government officials. All of this is undertaken in the name of fairness, but these inquiries might undermine any predictability of qualified immunity, further impede the prompt resolution of the civil rights suit, and in some cases defeat the plaintiff's claim by extending, however unpredictably, the defendant's qualified immunity.

Thus, some courts may begin with the broad assurance that "[g]overnment officials are charged with knowledge of constitutional developments, including all available decisional law."¹²⁴ Courts may then, however, choose a more realistic path. Courts may distinguish between government officials based on their better¹²⁵ and worse¹²⁶ practical access to legal information, if not their different degrees of personal legal knowledge and training.¹²⁷ The path of realism leads to consideration, as well, of the nature and status of the court issuing the new law,¹²⁸ that court's geographical proximity to the defendant government official,¹²⁹ the frequency of the sort of litigation at issue¹³⁰ generally or for persons doing the defendant's job, the kinds of sources of¹³¹ the legal decision and the length of

tion exceeds honest error of judgement and amounts to abuse of their office . . ."); Bruce R. Grace, Note, *Ignorance of the Law as an Excuse*, 86 COLUM. L. REV. 1392, 1392 (1986) (arguing that "due process requires a mistake of law defense for laws that criminalize ordinary behavior"); Dan M. Kahan, *Ignorance of the Law Is an Excuse: But Only for the Virtuous*, 96 MICH. L. REV. 127, 129 (1997) ("Malum prohibitum crimes are the ones most likely to be interpreted as permitting mistake of law defenses."). Of course both the category of "malum prohibitum" crimes and of "ordinary behavior," as referred to above, are themselves vague enough to introduce additional uncertainty into the law.

124. *Tribble*, 860 F.2d at 324 (citing *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1048 (9th Cir. 1988)); see also *Waddell*, 108 F.3d at 893.

125. See *Burnham*, 119 F.3d at 677 n.17 (comparing the degrees of access to legal advice of a university's history department and the school's chancellor, in the qualified immunity context).

126. See *Lintz v. Skipski*, 25 F.3d 304, 305-06 (6th Cir. 1994) (noting social worker defendants in particular are usually not lawyers, and do not have "familiarity with the contents of the Federal Reporter," and therefore require time to learn of and adjust to new case law).

127. See *id.* at 305; *Burnham*, 119 F.3d at 677 n.117. See also Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 622 (1989) (discussing several relevant circumstances).

128. See *Johnson-El*, 878 F.2d at 1049; *Williamson*, 786 F. Supp. at 1262.

129. See *Johnson-El*, 878 F.2d at 1049; *Williamson*, 786 F. Supp. at 1262.

130. See *Johnson-El*, 878 F.2d at 1049; *Williamson*, 786 F. Supp. at 1262.

131. See *Garcia v. Miera*, 817 F.2d 650, 657 n.10 (10th Cir. 1987) ("Defendants' assertion that the law library of the New Mexico Supreme Court received the bound volume 691 of the Federal Reporter 2d in May 1983 itself implies that advance sheets were received several months earlier. The publication of advance sheets, as well as the availability of the

time¹³² the legal decision has been available, and the common-sensical or difficult nature of the legal issues involved.¹³³ Unfortunately, from the standpoint of both the plaintiff and the defendant, much of this "realistic" inquiry must be fact specific and fact intensive, with discovery and testimony being clearly required.

In these kinds of cases, the temptation to assess the defendant's legal knowledge by referring to what is deemed fair at various times,¹³⁴ or reasonable,¹³⁵ or commonsensical¹³⁶ is obviously powerful. This broad-based, multi-faceted, inescapably subjective inquiry, however, disserves the interests of both defendants and plaintiffs in crucial respects. The defendant in such cases can hardly predict, once the lawsuit is filed, whether qualified immunity will in this respect be recognized, thus complicating and extending the litigation or settlement process. And the plaintiff may be denied recovery, on grounds of qualified immunity, even in cases in which the

decision much earlier by way of various legal and professional reporting services available to school officials and their legal advisors, were sufficient to give defendants notice." Another query is whether Internet or other computerized database availability should be deemed to further speed up the process, at least in some cases. *See also Robinson*, 840 F.2d at 350 n.2. (average police officer might be apprised of a decision if "news was widely published in newspapers or broadcast in other media").

132. *See Garcia*, 817 F.2d at 657 n.10; *Schlothauer v. Robinson*, 757 F.2d 196, 197 (8th Cir. 1985) (recognizing Eighth Circuit decision eleven days prior as not clearly establishing the law at the time of plaintiff's arrest); *Arebaugh v. Dalton*, 730 F.2d 970, 972 (4th Cir. 1984) ("Certiorari had been granted . . . almost a year before final decision at the Supreme Court level. Twelve days may well turn out to have been sufficient time for someone with a direct interest to have learned of, read and digested the . . . holding."); *Williams v. Smith*, 781 F.2d 319, 322 (2d Cir. 1986) (recognizing "reasonable prison official" not bound to have known of two month old New York state court ruling pending its appeal to the Appellate Division); *Doby v. Hickerson*, 120 F.3d 111, 114 (8th Cir. 1997) (explaining that the crucial point was not actual release of Supreme Court opinion, but its realistic availability to the defendant within some days thereafter); *Robinson*, 840 F.2d at 350 (recognizing that a police officer is not bound to know of Supreme Court decisions four days after release, but law clearly established on other grounds); *Martin v. Heideman*, 106 F.3d 1308, 1310, 1312-13 (6th Cir. 1997) (relying at least in part on a number of post-incident or unreported decisions in finding excessive force law clearly established at the time). *See also Boyd v. Knox*, 47 F.3d 966, 969 (8th Cir. 1995).

133. *See Johnson-El*, 878 F.2d at 1049 (noting prison condition litigation as typically presenting recurring issues readily grasped by non-lawyers).

134. *See Lintz*, 25 F.3d at 306. In this respect and by way of further complication, courts have held that later, post-incident judicial decisions can work backward in time to help determine what law was clearly established at the time of the incident. *See Parrish v. Mallinger*, 133 F.3d 612, 616 (8th Cir. 1998) (citing *Offet v. Solem*, 936 F.2d 363, 367 (8th Cir. 1991)).

135. *See Lintz*, 25 F.3d at 306.

136. *See Williamson*, 786 F. Supp. at 1262.

relevant courts had indeed recognized the relevant right as of the actual time of the defendant's act.

VII. GRANTS OF QUALIFIED IMMUNITY AS HINDERING THE DEVELOPMENT OF SUBSTANTIVE FEDERAL RIGHTS LAW

We have seen that in order to prevail against a government actor defendant, a civil rights plaintiff must, in effect, show two things: a violation of some otherwise enforceable federal right, and that the right in question was clearly established at the time of the defendant's act.¹³⁷ A right that is clearly established later, but not at the time of the defendant's act, will thus not suffice.¹³⁸ One obvious and apparently uncontroversial way of deciding many interesting civil rights cases is to take advantage of this distinction. The court, at the trial level or on appeal, may thus decide the case in the following way: whether the plaintiff actually held, at the time of the incident, some alleged federal right is a controversial, broad issue of substantive law that need not be reached. Instead, the case can be decided for the defendant on the clearer and less controversial grounds that no such right as the plaintiff claims was clearly established at the time of the defendant's action.¹³⁹ The latter grounds by itself is enough to establish qualified immunity.

Such an approach thus sets aside the merits of the plaintiff's substantive rights claim, holding instead that even if there is or was some validity to the plaintiff's rights claim, no such right was clearly established at the time.¹⁴⁰ This approach has not always been used or endorsed by the Supreme Court,¹⁴¹ but it seems to have certain jurisprudential virtues. Fo-

137. See *Siebert*, 500 U.S. at 231-32.

138. See, e.g., *Warner*, 57 F.3d at 964 ("Without addressing the merits of the constitutional issue, we hold that it was not clearly established on the date in question that a strip search . . . was unconstitutional."); *Spivey v. Elliott*, 41 F.3d 1497, 1498-99 (11th Cir. 1995); *Schlothauer*, 757 F.2d at 197.

139. See, e.g., *Jenkins*, 115 F.3d at 824 n.2 ("Because we conclude that, on May 1, 1992, the law . . . was not clearly established . . . we need not reach the question of whether Jenkins' . . . Fourth Amendment rights were, in fact, violated."); *Warner*, 57 F.3d at 964; *DiMeglio*, 45 F.3d at 790; *Spivey*, 41 F.3d at 1498-99; *Acierno*, 40 F.3d at 606 n.7; *Rakovich*, 850 F.2d at 1213-14.

140. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 535, 535 n.12 (1985).

141. See *Siebert*, 500 U.S. at 232-34 ("Siebert failed not only to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but also to establish the violation of any constitutional right at all."); *Manzano*, 60 F.3d at 510 n.2 (interpreting *Siebert*, despite disagreement from other courts, to require that a court address the question of the existence of the right first, before considering its clarity of establishment).

cluding on the lack of clear establishment of the right, as opposed to deciding on its bare existence or non-existence, has its attractions.

In particular, such an approach seems in the spirit of Justice Louis Brandeis' principles articulated in his well-known *Ashwander* concurrence.¹⁴² Brandeis sought to discourage resolving constitutional issues where such a resolution is unnecessary to decide the case, and also to discourage unnecessarily broad constitutional holdings.¹⁴³ In some measure, these principles are a matter of avoiding, or at least postponing, controversial constitutional decisions.¹⁴⁴

Typically, holding that an alleged constitutional right was not clearly established as of any earlier date, if it exists at all, will seem narrower and less controversial than declaring that such a right did in actuality exist at that time and that the defendant violated that right, but that the defense of qualified immunity should nonetheless prevail, as the right was not at that time clearly established. Certainly, it will often be less burdensome, costly, and time-consuming for courts to decide merely the former, as opposed to the latter.¹⁴⁵

Can we say, though, that avoiding a determination that the alleged right did or did not exist at the time is a politically neutral principle? Plainly not. This approach does allow courts to avoid a holding that an alleged right does not exist. Anyone promoting a particular alleged right is admittedly better off with a holding that the right was at best not clearly established, as opposed to simply non-existent. And it is minimally possible that a court might refuse to recognize a constitutional right because of the judge's sense that current, as opposed to future, defendants should not

For an expression of concern that qualified immunity law may pose "the distinct danger of redefining substantive constitutional law," see David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 27 (1989).

142. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341-49 (1936) (Brandeis, J., concurring).

143. See *id.* at 347 (Brandeis, J., concurring). For discussion, see Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994). See also Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1 (1996); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71 (1995).

144. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring) ("Constitutional adjudications are apt by exposing differences to exacerbate them.").

145. See *DiMeglio*, 45 F.3d at 798.

be held liable for the violation of that right. But plaintiffs cannot be afraid to risk early rejection on the merits, and therefore cannot typically favor an *Ashwander*-type rule that reduces the likelihood of both highly disfavored outcomes and a favored outcome in the form of a holding that the right actually existed, whether clearly or not. Plaintiffs seeking recognition of a relatively unfamiliar right would presumably not typically bring the case without some realistic prospect of success, or at least a sense that initial defeats on the merits need not be final. Those promoting such a right should, as plaintiffs, normally prefer a decision that reaches the merits of the right claim itself.

Advocates for unfamiliar rights should therefore recognize that holding that a right was not clearly established—which is, certainly, to be expected—may prevent the court from issuing the much more favorable ruling that there was, or at least is now, just such a right, but that the right was not clearly established at the time of the defendant's act. Those pursuing non-traditional rights claims can live with such a ruling.¹⁴⁶ After all, if several courts issue the same ruling—that the right really exists, but was not clearly established at the time of the defendant's act—the sting of such a holding is eventually self-limiting. With enough such decisions, over time, it becomes easier to argue that the right is by now in fact well-recognized.

The current *Ashwander*-inspired approach has, more particularly, a built-in, almost definitional, class bias. If we assume that different groups hold different degrees of political and legal power, it will not surprise us that the rights of special concern to the relatively powerful will ordinarily be established earlier and more clearly than those of less powerful, and indeed outcast groups. To be powerful is to be able to protect one's legal interests.

Of course, there is a sense in which the legal rights even of outcasts are established early and clearly. It is in this sense that it is in a master's interests that the quite limited legal rights of the slave be well-established. But it is likely that potential rights of greatest interest to outcast groups will not be recognized at all, let alone clearly established, at the same time as the rights of greatest interest to more privileged groups. Thus, for example, the voting rights of all competent adult Americans were not recognized at

146. It may be said that if a court determines that a right exists, but that its existence was not clearly established at the time, only the second part of the determination is the holding, and the first part, on the existence of the right, becomes dictum. If so, it is still true that favorable dicta can, at this stage, be valuable in extending federal rights, and that repeated favorable dicta can be even more so.

the same time,¹⁴⁷ and various potential rights of practical interest to the least well off, such as to subsistence, housing, education, or medical care, are still not established at the constitutional level.¹⁴⁸ At the very least, we would expect the due process rights of welfare recipients to be clearly established long after those traditional property holders.¹⁴⁹

The practical implications are obvious. Rights that are not yet clearly established tend to be those of the least well off. And it is precisely those sorts of rights the violation of which is excused by the doctrine of qualified immunity.

CONCLUSION: ABOLISHING QUALIFIED IMMUNITY AND PERSONAL
LIABILITY IN FAVOR OF CONTROLLED VICARIOUS LIABILITY OF
GOVERNMENTAL UNITS

The unnecessary complications, costs and delays, indeferminacies and injustices of qualified immunity doctrine could be multiplied at any length. At some point, one must consider reasonable alternatives to the reign of qualified immunity. Certainly one attractive alternative would be to expand, in some fashion, the role of cities and counties and other governmental units as civil rights defendants. After all, such entities are not entitled to assert a qualified immunity defense on their own behalf under current law.¹⁵⁰ And the underlying individual actor is not only an employee, but an employee whose action was undertaken under color of state law.¹⁵¹ Why not then abolish not just qualified immunity, but all civil rights suits against individual employee actors in their personal capacity, with the suit being brought instead against the employing municipality?¹⁵²

147. See, e.g., U.S. CONST. amend. XV, § 1 ("race, color, or previous condition of servitude") & amend. XIX ("on account of sex").

148. See R. GEORGE WRIGHT, *DOES THE LAW MORALLY BIND THE POOR?* ch. 1 (New York University Press 1996).

149. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (recognizing a protectable property interest in the continued receipt of statutory welfare benefits according to specified eligibility criteria).

150. See *Owen v. Independence*, 445 U.S. 622, 650 (1980); *Africa*, 49 F.3d at 975 (Scirica, J., concurring and dissenting); *Brown*, 922 F.2d at 1105.

151. See 42 U.S.C. § 1983; *Lugar v. Edmundson Oil Co.*, 457 U.S. 922 (1982); *Monroe v. Pape*, 365 U.S. 167 (1961), *rev'd on other grounds* by *Monell v. Department of Soc. Serv.*, 436 U.S. 658 (1978); *Screws*, 325 U.S. at 91 (discussing the criminal civil rights statute context).

152. It is certainly possible for private parties not employed by any municipality to act under color of state law and violate § 1983. See, e.g., *Kadivar v. Stone*, 804 F.2d 635 (11th Cir. 1986). But such private parties may not be able to assert a qualified immunity defense even under current law. See *Richardson v. McKnight*, 521 U.S. 399, 399 (1997) (recogniz-

Rather than leave individual government employee defendants with no qualified immunity defense, fairness suggests that the civil rights action be brought not against the now defenseless individual employee, but against the municipality served. A case on grounds of legal simplicity, reduced costs and delays, and fairness to all parties, including genuinely injured plaintiffs previously denied full or any recovery, can easily be made. Recovery against the municipality instead can be controlled in many ways without reinstituting the inefficiencies and injustices of qualified immunity. Losses can be appropriately spread without impairing the ability of municipalities to reasonably discipline and control employee conduct. If necessary, damages recovery against municipalities could be capped or limited in ways consistent with efficiency and fairness to all parties.

Such reforms would clearly require revision of the current law of municipal liability. Such law is, however, currently neither so efficient nor so patently just as to discourage revision. Legitimate municipal and public interests can be accommodated under a rule in which municipalities, still without qualified immunity, are generally available for suit as the exclusive defendant.

Admittedly, the current scope of municipal liability is relatively narrow. In particular, cities and counties are not liable in § 1983 actions on a vicarious liability¹⁵³ or respondeat superior theory.¹⁵⁴ Thus, it is said, a municipality currently may not be sued solely because it employs a tortfeasor¹⁵⁵ as opposed to a case in which some municipal policy or custom caused the plaintiff's injury.¹⁵⁶

Actually, some sort of line of causation can always be traced between an injury committed under color of state law by a state employee acting generally within the scope of assigned job responsibilities, and some governmental policy, custom, or official decision. Clearly, the employee would not or could not have committed the wrong under color of state law without the governmental decision to hire the actor and assign particular job responsibilities. The relevant issue could be formulated as one of de-

ing private prison guards are not entitled to claim qualified immunity, in light of purposes of qualified immunity and lack of a sufficient historical tradition of such immunity).

153. See, e.g., *Board of County Comm'rs v. Brown*, 520 U.S. 397, ___, 117 S. Ct. 1382, 1388 (1997); *Collins v. City of Harker Heights*, 503 U.S. 115, 122-23 (1992).

154. See *Brown*, 520 U.S. at ___, 117 S. Ct. at 1388; *Collins*, 503 U.S. at 122-23.

155. See, e.g., *Brown*, 520 U.S. at ___, 117 S. Ct. at 1388; *Monell*, 436 U.S. at 691-92.

156. See *Brown*, 520 U.S. at ___, 117 S. Ct. at 1388; *Canton v. Harris*, 489 U.S. 378, 385 (1989); *Monell*, 436 U.S. at 691-92; *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 608 (1997).

gree of causation.¹⁵⁷ But to ask about the degree or strength of the causation between the municipality and the plaintiff's injury is not a direct approach to the essence of the issue.¹⁵⁸ The real issue is whether it is best to impose a legal duty on the municipality in such cases,¹⁵⁹ and this is ultimately a matter of all the relevant policy considerations.¹⁶⁰

The policy considerations opposing expanded municipal liability include the fear of overcrowded federal dockets,¹⁶¹ the costs to municipal treasuries,¹⁶² and general concern over escalating and occasionally extreme jury verdicts.¹⁶³ None of these considerations, however, undermines the overall advantages of a rule of municipal liability as opposed to individual government actor liability. Damages in civil rights cases can be capped in whatever way, or to whatever extent, one wishes, harshly or minimally.¹⁶⁴ Cities might well be required to pay damages judgments that would otherwise have been escaped, at least in part, by a city employee with limited assets.¹⁶⁵

It is difficult to see the non-satisfaction of meritorious federal judgments as particularly attractive. Admittedly, some employees are contractually indemnified by their employing government for their civil rights liability.¹⁶⁶ But to the extent that individual government actors are currently

157. See, e.g., *Pembauer v. Cincinnati*, 475 U.S. 469, 477 (1986); *Monell*, 436 U.S. at 691.

158. See, e.g., Sheldon Nahmod, *Government Liability Under Section 1983: The Present Is Prologue*, 21 URB. LAW. 1, 4 (1989); Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons From Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1765 (1989).

159. See Schuck, *supra* note 158 at 1765.

160. See *Hartley v. State*, 698 P.2d 77, 83 (Wash. 1985) (en banc); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 274 (5th ed. 1984); Schuck, *supra* note 158 at 1765.

161. See, e.g., Susanah M. Mead, 42 U.S.C. Section 1983 Municipal Liability: The *Monell Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 540-541 (1987).

162. See *id.*; *Pembauer*, 475 U.S. at 489 n.4 (Stevens, J., concurring in part and concurring in the judgment) (referring to "the fiscal plight of municipal corporations today").

163. See Terrence S. Welch & Kent S. Hofmeister, *Praprotnik, Municipal Policy and Policymakers: The Supreme Court's Constriction of Municipal Liability*, 13 S. ILL. U.L.J. 857, 857 (1989).

164. See, e.g., the range of damages caps in Title VII actions, as specified in 42 U.S.C. § 1981a(b)(3)(A)-(D) (1996). See also *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 (1981) (recognizing that cities are immune from punitive damages liability).

165. See, e.g., Larry Kramer & Alan O. Sykes, *Municipal Liability Under Section 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 276-77 (1987).

166. See, e.g., *Cornwell v. Riverside*, 896 F.2d 398, 398 (9th Cir. 1990) (recognizing the indemnification of an employee by city even regarding punitive damages award); *Jones v. Chicago*, 856 F.2d 985, 995 (7th Cir. 1988); Kramer & Sykes, *supra* note 165 at 277 n.95;

indemnified, this suggests that bringing the suit against the municipality and not the employee will not have dramatic fiscal consequences for the city.

Often, it may seem that the moral blame for a civil rights violation, if any, attaches more to the individual employee than to the municipality. Perhaps the city takes the law of unreasonable searches and seizures quite seriously, and regularly instructs its police officers in such matters. If a single police officer enters a gray area of the law, or perhaps even consciously violates clearly established legal principles taught by the department, is it fair and reasonable to allow the plaintiff to collect against the city, as opposed to the individual officer?

Actually, we already have in place most of the grounds for an affirmative answer to this question. The unnecessary costs and complexities of litigating qualified immunity issues are already borne not only by the litigants, but by any municipality that contractually indemnifies its employees.¹⁶⁷ The cost, in the broadest sense, to plaintiffs of currently having no practical recourse for many violations of important federal rights can rightly be said to be enormous. This single striking fact should no longer be minimized. Certainly, cities are in a better position to appropriately spread the economic costs of their agents' actual violations, clear and unclear, of federal rights than are plaintiffs or individual government actors.¹⁶⁸

Let us bear in mind that some common civil rights violations, such as those involving unreasonable searches and seizures, the use of excessive force, and arrests without probable cause, are likely not class neutral in their incidence.¹⁶⁹ Excessive force is not applied against a random sample of the citizenry. Recovery against the city in such cases tends to redistribute costs from less well off victims of rights violations to the generally better off beneficiaries¹⁷⁰ of city services in general.¹⁷¹ This process should be promoted.

see also David Rudovsky, *supra* note 1413 at 74 (noting the possibility of municipal indemnification of appropriate city employees).

167. See *supra* note 165 and accompanying text.

168. For discussion and further citations in the state tort law context, see for example, *Parish v. Pitts*, 429 S.W.2d 45, 49 (Ark. 1968). See also *Brinkman v. Indianapolis*, 231 N.E.2d 169, 172 (Ind. Ct. App. 1967).

169. See *Kramer & Sykes*, *supra* note 165, at 279. Admittedly, some constitutional torts such as violation of the free speech rights of government employees are not typically visited upon the economically worst off.

170. See *id.* It is possible to argue that taxpayers generally do not benefit from the rights violation itself, in the sense that the taxpayers would have been just as well off if the

These considerations do not directly address the sense that as between a single malicious government employee and an innocent government itself, blame should attach more to the former. This argument, however, simply raises the issue of the fairness of general agency principles, including that of respondeat superior, which we have long assumed to be well justified in other contexts.¹⁷² Let us remember that there can be no § 1983 violation without action under color of state law,¹⁷³ and that action under color of state law implies state action,¹⁷⁴ state causation,¹⁷⁵ and, crucially, a finding of genuine state responsibility.¹⁷⁶ Beyond some point, there is no action under color of state law, and hence no possible action under § 1983 against any defendant.

If this case of a malicious employee and an innocent government remains morally unsatisfying, we should remember as well that § 1983 actions need not be the only legal means of apportioning blame. An innocent

individual government actor had acted merely up to the border of the plaintiff's rights, and not beyond. Even if so, this hardly seems the relevant inquiry. In tort negligence and agency law, we may hold the employer or principal liable for acts within the scope of an employee's responsibility, even where the tortiousness of the employee's act did not itself actually benefit the employer. See RESTATEMENT (SECOND) OF AGENCY §§ 228-231 (scope of employment re tortious and criminal acts), § 243 (employee negligence), § 245 (use of force by employee) (1958).

171. Larry Kramer and Alan O. Sykes tentatively argue for both personal and municipal immunity for "good faith" rights violations. See Kramer & Sykes, *supra* note 165, at 301. Liability in such cases, whether in the form of nominal or realistic compensatory damages, should fall on the city even in such cases not out of a sense of moral outrage, but because constitutional rights are genuine rights, the violation of which should not go unredressed. It is up to the courts to decide what sort of state of mind is required as an element of the underlying rights violation itself. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986) (ruling no intent requirement for § 1983 violation itself, apart from whatever level of intent may be required to prove a violation of the underlying federal right itself). For an early suggestion of broader civic liability, see Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy For Law Enforcers' Misconduct*, 87 YALE L.J. 447, 456 (1978) ("[T]he objectives of compensating the victim and deterring misconduct would be met more frequently if the defendant were the wrongdoer's employer—either the appropriate unit of government or the governmental agency.").

172. See sources cited *supra* note 170.

173. See *supra* note 1.

174. See, e.g., *Lugar*, 457 U.S. at 928, 929 (ruling that an action under color of state law is essentially the equivalent to a Fourteenth Amendment state action) (citing *United States v. Classic*, 313 U.S. 299, 326 (1941) (holding misuse of state authority by an actor clothed with the authority of the state is action under color of state law)).

175. See *Lugar*, 457 U.S. at 937 (requiring a causation element for the existence of action under color of state law).

176. See *id.* at 935 n.18, (noting that state action, and thus action under color of state law require a showing of at least partial state responsibility). For a broader discussion, see R. George Wright, *State Action As State Responsibility*, 23 SUFFOLK U.L. REV. 685 (1990).

city may, if we wish, be permitted to seek partial or complete indemnity from a malicious employee.¹⁷⁷ The employee in such indemnity cases can be granted whatever defenses, if any, are deemed appropriate, including qualified immunity.¹⁷⁸ The injustices and inefficiencies of qualified immunity law in such indemnity cases would at least not be borne by the underlying rights victim. And of course, the incentives and rewards of potentially malicious civic employees can also be adjusted by contract terms regarding suspensions, demotions, and outright dismissal.

There is thus no reason to suppose that malicious individual government employees would get off scot free or be legally undeterrable if § 1983 recovery were solely against the employing municipality. If for any reason the judicial system insists on some sort of direct recovery against the malicious employee by the underlying plaintiff, the state law of intentional torts may instead be invoked, on whatever terms we wish.¹⁷⁹ Ultimately, the best justified solution seems to involve abolishing individual government employee liability along with qualified immunity, and allowing a much expanded scope for plaintiff recovery against the employing governmental unit.

177. For a discussion of background principles regarding an employee being required to indemnify an employer, see 3 FOWLER V. HARPER, ET AL, THE LAW OF TORTS § 10.2, at 57-59 (2d ed. 1986) (citing RESTATEMENT (SECOND) OF TORTS § 886B(2)(a) & cmt. e (1979)).

178. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (allowing immunity "so long as defendant acted in a reasonably objective manner").

179. Section 1983 actions themselves are often brought in conjunction with pendent state tort law claims. See, e.g., *Deakins v. Monahan*, 484 U.S. 193, 193 (1988); *Whitley v. Albers*, 475 U.S. 312, 316 (1986); *Riverside v. Rivera*, 473 U.S. 1315, 1316 (1985); *Lugar*, 457 U.S. at 940; *Fact Concerts*, 453 U.S. at 252.